SPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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JERRY H. GOLDFEDER and ALICE YAKER,

Plaintiffs,

-against-

Index No. 155687/16
Mot. Seq. Nos. 001 & 002

CENPARK REALTY LLC and ARGO REAL ESTATE LLC,

Defendants.

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HON. TANYA R. KENNEDY, J. S.C.:

Motion sequence numbers 001 and 002 are consolidated for disposition. In motion sequence No. 001, Plaintiffs Jerry Goldfeder and Alice Yaker move for (a) summary judgment, pursuant to CPLR 3212, (b) the dismissal of Defendants' affirmative defenses, pursuant to CPLR 3211(b), and (c) an award of overcharges, treble damages, legal fees, and interest. In motion sequence number 002, Defendants Cenpark Realty LLC and Argo Real Estate LLC move (a) for summary judgment, pursuant to CPLR 3212, dismissing Plaintiffs' overcharge claims and/or determining that the four-year look-back rule set forth in CPLR 213-a, Rent Stabilization Law (RSL) §26-516(a) and (g) and Rent Stabilization Code (RSC) §2526.1(a)(2) for residential overcharge cases applies in this action; and (b) permitting Defendants to amend the New York State Division of Housing and Community Renewal (DHCR) Apartment Rent Regulations.

BACKGROUND

On or about March 17, 2009, Plaintiffs entered a lease for apartment 16F (the Apartment) located at 360 Central Park West, New York, New York (the Building) at a monthly rent of

$5,000.00 from April 1, 2009 to March 31, 2011 (the initial lease) (complaint, ¶¶ 7, 16; Plaintiffs' Exhibit F). Prior to Plaintiffs' occupancy of the Apartment, a rent-controlled tenant resided there for many years and vacated the Apartment in or about 2008 (complaint, ¶¶14-15; Higgins Supporting Affidavit, ¶3).

Defendant Cenpark Realty LLC (Cenpark) is the landlord and owner of the Building and Defendant Argo Real Estate LLC (Argo) is the managing agent of the Building and "is responsible for the operation and management of the Building, including the collection of rent" (complaint, ¶¶ 7-8). Cenpark and Argo will be collectively referred to herein as "Landlord."

Defendants received J-51 tax benefits for the building from 1999-2010, which rendered the Plaintiffs' Apartment subject to rent stabilization (*id.*, ¶ 13; Plaintiffs' Exhibit C; Defendants' Exhibit D). However, the Landlord filed an Owner's Report of Vacancy Decontrol and an Initial Registration with DHCR on or about April 1, 2009, listing the Apartment as exempt due to high-rent vacancy deregulation, which it served upon Plaintiffs by certified mail, return receipt requested on April 3, 2009 (Defendants' Exhibit D; Higgins Supporting Affidavit, ¶4). It does not appear that DHCR rejected or that Plaintiffs objected to these filings (*id.*).

Plaintiffs and Landlord subsequently executed non-stabilized leases for the Apartment from April 1, 2011 to March 31, 2013 at a monthly rent of $5,100.00 and from April 1, 2013 to March 31, 2015 for a monthly rent of $5,200.00 (Defendants' Exhibits G, H). Following the expiration of the April 1, 2013 to March 31, 2015 lease term, Plaintiffs continued to pay, and Defendants accepted monthly rent of $5,200.00 from April 2015 through November 2015 (complaint, ¶26; Plaintiffs' Exhibit F; Defendants' Exhibits I, J).

On March 27, 2014, Defendant Cenpark commenced a declaratory judgment action

against Plaintiffs in Supreme Court, New York County under Index No. 152928/2014 regarding the regulatory status of the Apartment (Cenpark Action) (complaint, ¶45). Plaintiffs moved to dismiss the complaint in the Cenpark Action and the court (Coin, J.S.C.) issued a judgment filed on May 22, 2015, which, *inter alia*, granted, without opposition, so much of the motion as sought to dismiss the complaint and a declaratory judgment that the subject Apartment was rent stabilized (*id.*, ¶¶49-50). Four months after the court's judgment, the Landlord offered Plaintiffs a rent stabilized lease renewal on or about August 19, 2015 for a term commencing December 1, 2015 and through November 30, 2016 at a monthly rent of $5,200.00 (*id.*, ¶¶ 51, 53; Plaintiffs' Exhibit F; Defendants Exhibit I).

On July 8, 2016, Plaintiffs commenced this action to recover monetary damages for rent overcharges and for other related relief. Plaintiffs allege, *inter alia*, that Defendants engaged in fraud and violated the RSC by filing income certification forms as if Plaintiffs were rent stabilized tenants while simultaneously falsely treating Plaintiffs as non-regulated tenants (complaint, ¶54). Plaintiffs also maintain, *inter alia*, that the Landlord engaged in fraud by listing the Apartment as non-regulated when it filed a condominium offering plan with the New York State Attorney General in 2012 (Plaintiffs' Exhibit J). Further, Plaintiffs allege, *inter alia*, that the rent charged to and collected from Plaintiffs on the 'base date,' the date four years prior to the commencement of this action, is unreliable and cannot be used for determining the legal regulated rent, as it is the product of fraud and an illegal scheme to deregulate the Apartment (complaint, ¶¶59-60).

Plaintiffs now move for summary judgment. Plaintiffs acknowledge that rent overcharge claims are subject to a four-year statute of limitations and that the legal regulated rent used in

calculating any overcharge is the rent charged four years prior to the date that the overcharge complaint is filed (i.e. the "base date"). Plaintiffs also argue that this Court should examine the entire rent history in calculating the overcharge since the Landlord illegally deregulated the Apartment in 2009 and charged Plaintiffs an illegal deregulated rent. As such, Plaintiffs maintain that this Court should use either of the three formulas set forth by DHCR and affirmed by multiple court rulings: (1) the formula established by the Appellate Division, First Department in *72A Realty Associates v Lucas* (101 AD3d 402 [2012]), (2) the RSC Code formula set forth in RSC §§2522.6(b)(2) and 2522.6(b)(3), or (3) the formula as set forth by the Court of Appeals in *Thornton v Baron* (5 NY3d 175 [2005]).

Plaintiffs also claim that the Landlord's overcharge entitles them to recover legal fees pursuant to the RSC and the terms of their initial and renewal leases, as well as an award of treble damages since the overcharge was willful. Further, Plaintiffs argue that all the Landlord's affirmative defenses are conclusory and fail to set forth a factual basis as required under CPLR 3013.

In support of the motion for summary judgment and in opposition to Plaintiffs' motion, the Landlord maintains that the Apartment was subject to rent control, and not rent stabilization, prior to the commencement of Plaintiffs' tenancy, and that the Apartment was deregulated upon the rent-controlled tenant's vacatur. Additionally, the Landlord argues that once the rent-controlled tenant vacated the Apartment, Landlord was permitted to raise the rent to fair market value, subject to Plaintiffs' filing of a Fair Market Rent Appeal (FMRA) with DHCR.

The Landlord also argues that Plaintiffs failed to file a FMRA within ninety-days of service of the Initial Apartment Registration, or within four years of the rent-controlled tenant's

vacatur, if the Initial Apartment Registration was not filed, and that Plaintiffs should have filed a FMRA by 2012. Therefore, the Landlord maintains that Plaintiffs' overcharge claims should be dismissed for lack of subject matter jurisdiction since Plaintiffs failed to file a FMRA within four years of their initial occupancy of the Apartment with DHCR, which has exclusive jurisdiction over such matters.

The Landlord also maintains that since Plaintiffs filed the summons and complaint on July 8, 2016, review of the Apartment rental history is limited to July 8, 2012. According to the Landlord, Plaintiffs failed to establish that the rent records are unreliable and that this Court should not disregard the four-year rule. Further, the Landlord argues that it mistakenly deregulated the Apartment and did not engage in any fraud to deviate from application of the four-year rule.

Among the papers Landlord submits in support of the motion for summary judgment is an affidavit from Argo's Vice President, Marina Higgins, in which she avers, *inter alia*, that following the commencement of Plaintiffs' initial lease, the increases in their rent were less than those permitted by the Rent Guidelines Board (Higgins Supporting Affidavit, ¶¶15-16). She also maintained that the Landlord filed DHCR Rent Registrations for the Apartment from 2009 through 2017 (*id.*, ¶17; Defendants' Exhibit K).

In reply, Plaintiffs reiterate their substantive arguments as to why this Court should apply one of the three default formulas they propose and maintain, *inter alia*, that the Landlord's summary judgment motion should be denied as untimely as it was filed more than 120 days after filing the note of the issue, without any showing of good cause.

The Landlord argues in reply that the decision of *Cenpark Realty LLC v Appelbaum*, Sup

Ct., NY County, December 18, 2017, Coin, J., index No. 152938/14, is controlling in this matter. Additionally, the Landlord reiterates its prior arguments that Plaintiffs failed to timely file a FMRA and that there are no indicia of fraud to warrant any deviation from the four-year rule. The Landlord also argues, *inter alia*, that its summary judgment motion was filed less than one month after the note of issue was filed and that Plaintiffs filed their motion less than two weeks before the 120-day deadline.

According to the Landlord, the delay in filing the motion was minimal and non-prejudicial since this action has been pending since 2016. The Landlord maintains that a court has the discretion to grant an untimely summary judgment motion, even in the absence of good cause, where a timely summary judgment motion was filed seeking relief nearly identical to that sought in the untimely motion. Lastly, the Landlord reiterates its arguments that there is no rent overcharge and that it filed rent registrations for the Apartment from 2009 through 2017 (Higgins Reply Affidavit, ¶¶14-16).

After both motions were fully submitted, Plaintiffs maintained that the recent Appellate Division, First Department decision in *Kreisler v B-U Realty Corp* (164 AD3d 1117 [2018]) was relevant and dispositive of the issues before this Court. This Court permitted the Plaintiffs and Landlord to submit additional papers to address recent Appellate Division, First Department authority.

DISCUSSION

CPLR 3212(a) requires that summary judgment motions must "be made no later than one hundred and twenty days after the filing of the note of issue, except with leave of the court on good cause shown" (*Brill v City of New York*, 2 NY3d 648 [2004]; *Filannino v Triborough*

Bridge & Tunnel Auth., 34 AD3d 280 [1st Dept 2006]).

Plaintiffs filed their summary judgment motion less than two weeks prior to the 120-day deadline and Landlord filed its motion less than one month past the deadline. While Plaintiffs maintain that this Court should not entertain the Landlord's motion, the Landlord correctly contends that Plaintiffs have failed to establish any prejudice by such delay. The Appellate Division, First Department determined in *Filannino v Triborough Bridge and Tunnel Auth.*, *supra*, that a court may entertain a belatedly filed summary judgment motion, even in the absence of good cause, where a timely summary judgment motion was made which seeks identical relief to that sought in the untimely motion.

In *Filannino,* the Appellate Division, First Department, stated in pertinent part that:

> "[a]n otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion . . . The court's search of the record, however, is limited to those causes of action that are the subject of the timely motion" (*id.* at 281) [internal citations omitted].

This Court will entertain Landlord's summary judgment motion since it was filed in response to Plaintiff's pending motion and both motions present the same factual issues and legal arguments for the Court's consideration and determination.

The proponent of a summary judgment motion must establish its prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [internal citations omitted].

In *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]), the Court of Appeals held that building owners may not take advantage of the luxury decontrol provisions of the RSL while simultaneously receiving tax incentive benefits under New York City's J-51 program (now Administrative Code of City of New York §11-243). Prior to *Roberts*, landlords relied upon DHCR's interpretation of the luxury decontrol statute as permitting deregulation in buildings receiving J-51 benefits.

When the Court of Appeals decided *Roberts* in 2009, the law was unclear as to whether *Roberts* applied retroactively (*see Matter of Park v New York State Div. of Hous. & Community Renewal,* 150 AD3d 105, 110 [1st Dept 2017] ["Roberts expressly left open certain important issues, including whether it had retroactive effect"]). However, the Appellate Division, First Department subsequently determined that *Roberts* had retroactive effect as of 2011 (*see Gersten v 56 7th Ave. LLC.*, 88 AD3d 189 [1st Dept 2011], appeal withdrawn 18 NY3d 954 [2012]).

The proper initial rent for a tenant who leases a vacant apartment that was previously rent controlled is such rent as the tenant and the landlord agree upon, subject to the landlord providing the tenant with an Initial Apartment Registration, and the tenant timely filing a FMRA with DHCR (*see* RSL §26-512[b][2]; RSC §2521.1[a][1]; *Matter of IG Second Generation Partners L.P. v New York State Div. of Hous & Community Renewal Off. of Rent Admin.*, 10 NY 3d 474, 481 [2008]; *Matter of Verbalis v New York State Div. of Hous. & Community Renewal*, 1 AD3d 101, 103 [1st Dept 2003]; *Cenpark Realty LLC v Applbaum,* Sup Ct, NY County, December 18, 2017, Coin, J., index No. 152938/14).

In *Cenpark Realty LLC v Appelbaum*, *supra*, the Plaintiffs resided in the same building herein and commenced their tenancy following vacatur of the rent-controlled tenant and pursuant

to an unregulated lease. The landlord in *Appelbaum* (the Defendants in this action) received J-51 benefits during the time when the Plaintiffs in that action commenced their tenancy.

The court in *Appelbaum* cited to RSL §26-512(b)(2) and held that the initial rent for an apartment after the vacatur of a rent-controlled tenant is the first rent agreed to by the landlord and the tenant pursuant to a lease, subject to a FMRA. Additionally, the court noted in *Appelbaum* that *Taylor v 72A Realty Assoc., L.P.* (151 AD3d 95) was not controlling since the apartment was rent stabilized prior to the plaintiff's tenancy and was improperly withdrawn from rent-stabilization whereas the plaintiff's initial rent, just as in the instant matter, was properly set at market rate.

Further, the court noted in *Appelbaum* that the case of *Altschuler v Jobman 478-480, LLC* (135 AD3d 439 [1st Dept 2016]) was also inapplicable since the tenant demonstrated that the apartment was unlawfully regulated prior to the commencement of his tenancy. Here, it is undisputed that the Landlord provided the requisite notice and that Plaintiffs failed to act. Here, in contrast to *Taylor* and *Altschuler*, the initial rent charged to Plaintiffs herein was lawful.

It is now evident that after the vacatur of rent-controlled tenant, Landlord should have registered the Apartment as rent stabilized, at the rent which Plaintiffs agreed to pay. There is also no dispute that the Apartment is rent stabilized. Since the Plaintiffs' rent clearly exceeded the level at which rent stabilized apartments generally became unregulated, and DHCR policy, at that time, allowed landlords, who were receiving J-51 tax benefits, to take advantage of the luxury decontrol provisions of the RSL, Landlord cannot be held to have acted fraudulently in 2009 (*see Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal,* 164 AD3d 420 [1st Dept 2018]; *Raden v W 7879, LLC*, 164 AD3d 440 [1st Dept

2018]; *Matter of Park v New York State Div. of Hous. & Community Renewal, supra*; *Cenpark Realty LLC v Appelbaum, supra).*

Here, as in *Cenpark Realty LLC v Applebaum*, Landlord acted unlawfully by failing to offer Plaintiffs a rent-stabilized lease in 2012; failing to register the Apartment as rent stabilized; and representing the Apartment to be unregulated in its plan to convert the Building to condominium ownership, which it filed with the Office of the Attorney General in 2012. However, the supporting and reply affidavits of Argo's Vice President, Marina Higgins, establish that following the commencement of Plaintiffs' initial lease, the increases in their rent were less than those permitted by the Rent Guidelines Board, which Plaintiffs fail to refute. Further, the Landlord filed DHCR Rent Registrations for the Apartment from 2009 through 2017.

Accordingly, since Plaintiffs' initial rent was lawful, and no subsequent increase of their rent exceeded the amounts that would have been charged had Landlord treated the Apartment as rent-stabilized from 2009 and onward, Plaintiffs have not been overcharged.

Lastly, the Plaintiffs' reliance on the recent Appellate Division, First Department decision in *Kreisler v B-U Realty Corp.* (164 AD3d 1117 [2018]) is misplaced since the landlord engaged in a fraudulent scheme in 2010 to deregulate the apartment following the *Roberts* decision. Further, the court in *Kreisler* rejected the landlord's reliance upon the pre-*Roberts* framework for luxury deregulation as a defense to justify its actions since its wrongful conduct occurred after the *Roberts* decision.

Since this Court has determined there is no overcharge, the Court need not determine the parties' remaining contentions.

Accordingly, it is

ORDERED that, in motion sequence number 001, Plaintiffs' motion for summary judgment is denied; and it is further

ORDERED that, in motion sequence number 002, Defendants' motion for summary judgment dismissing the complaint and permitting Defendants to file amended rent registrations for Plaintiffs' Apartment, with the New York State Division of Housing and Community Renewal is granted and the case is dismissed without costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York
April 5, 2019

ENTER:

Hon. Tanya R. Kennedy
J.S.C.

HON. TANYA R. KENNEDY